Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

THOMAS E. KNUTH,
Petitioner,

v.

SANDRA M. KNUTH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States of America

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Macomb County Circuit Court err by taking jurisdiction? Did the Michigan Court of Appeals and the Michigan Supreme Court then err by overlooking proper procedure with regard to Tennessee jurisdiction? Did the Tennessee Court err by not taking jurisdiction and deciding the case despite the Michigan Circuit Court's opinion?

2. Did the Michigan Courts err in their opinion that residence is a matter of intent rather than a state of physical abode? If not, then did the Macomb County Circuit Court err in application of due process by denying the defendant's request for an evidentiary hearing while accepting competing affidavits as the sole basis for determining intent? Did the Michigan Court of Appeals err by accepting, prima facia, a summary of the competing affidavits without exploring evidence? Did the Michigan Supreme Court err by finding no question in need of review?

3. Did the Macomb County Circuit Court of Michigan err in nullifying the Soldiers and Sailors Civil Relief Act?

PARTIES TO PROCEEDING

Petitioner:

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Respondent:

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OPINIONS BELOW

The denial by the Michigan Supreme Court of the motion for reconsideration (App. A, p. 1a) and the order of the Michigan Supreme Court to deny the application for appeal (App. B, p. 2a). Appendix C (p. 3a-4a) includes Michigan Supreme Court notes based on oral arguments. The State of Michigan Court of Appeals per curiam judgment (App. D, p. 5a-8a) and the opinion and order of the State of Michigan Circuit Court for the County of Macomb (App. E, p. 9a-12a), order of the Fourth Circuit Court for Davidson County Tennessee (App. F, p. 13a).

JURISDICTION

The opinion and order of the Macomb County Circuit Court (App. E, p9a-12a) claiming jurisdiction was entered on 24 September 1998. The counter-filed case was heard in the

Fourth Circuit Court for Davidson County Tennessee on 7 August 1998 with the certificate of service for the resultant order claiming jurisdiction dated 13 August 1998 while stamped "entered" on 27 October 1998. (App. F, p. 13a). The subsequent jurisdictional quagmire is the subject of this case.

STATUTORY PROVISIONS INVOLVED

The Michigan Supreme Court (MCL 552.9) provides:

> Sec. 9. (1) **A judgment of divorce shall not be granted by a court of this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint**, and, except as otherwise provided in subsection (2),[1] the complainant or defendant **has resided in the county in which the complaint is filed for 10 days** immediately preceding the filing of the complaint.

MCL 552.9a provides: Divorce; **domicile of defendant**; service of process

> Sec. 9a. **No decree of divorce shall be granted in any case except when 1 of the following facts exists**:
>
> a. **The defendant is domiciled in this state** at the time the bill of complaint is filed. [OR]
>
> b. **The defendant shall have been domiciled in this state** when the cause for divorce alleged in the bill or petition arose. [OR]
>
> c. **The defendant shall** have been brought in by publication or shall have been personally served with process **in this state**, or shall have been personally served with a copy of the order for appearance and

[1] (2) [Exception to 10 day county residence requirement if defendant is foreign national, minor children involved, risk that minor children will be taken outside Untied States].

publication **within this state**, or elsewhere, or has voluntarily appeared in the action or proceeding. Whenever any such order shall be served **outside this state**, proof of such service shall be made by the affidavit of the person who shall serve the same, made before a notary public, and when such affidavit shall be made **outside this state** it shall have attached the certificate of the clerk of the court of record, certifying to the official character of the notary and the genuineness of his or her signature to the jurat of the affidavit.

MCL 552.9e provides: Divorce; **cause occurring out of state; residence**

Sec. 9e. Whenever the cause for divorce charged in the bill or petition **has occurred out of this state**, no decree of divorce shall be granted unless the complainant or defendant **shall have resided in this state 1 year immediately preceding the filing of the bill** of complaint for divorce. **Absence from this state for not to exceed 90 days shall not be construed as to interfere with the fulfillment of the 1-year residence requirement** provided in the case of **causes for divorce occurring without this state.**

MCL 552.9f provides: Divorce; taking of testimony; minor children; perpetuating testimony; **nonresident defendant, residence of plaintiff**

Sec. 9f. No proofs or testimony shall be taken in any case for divorce [for 60 days if no minor children; 6 months with minor children; hardship exception; perpetuation of testimony exception] . . . . **When the defendant in any case for divorce is not domiciled in this state at the time of commencing the suit or shall not have been domiciled herein at the time the cause for divorce arose,** before any decree of divorce shall be granted **the complainant must prove that the parties have actually lived and cohabited together as husband and wife within this state, or that the com-**

plainant has in good faith resided in this state for 1 year immediately preceding the filing of the bill of complaint for divorce.

The Uniform Child Custody Jurisdiction Act of 1970 and the Revised Judicature Act. MCL 600.653 provides that a Circuit Court of the State has jurisdiction to make a child custody determination but only if one of the conditions stated in the statute exists. The conditions are:

a. Michigan is the "home state" (MCL 600.652(e)) of the minor child or had been the "home state" within 6 months before the commencement of the proceeding.

b. It is in the best interest of the child as he and his parents have a significant connection with the State and there is available in the State substantial evidence concerning the child's present and future care, protection, training, and personal relationships

c. The child is physically present in Michigan, has been abandoned, or there is an emergency that requires a Michigan court to protect the child.

d. It appears that no other State would have jurisdiction.

The Soldiers and Sailors Civil Relief Act (50 USC App 501 et seq) was enacted to protect the civil rights of persons in the military service remote from the site of litigation.

STATEMENT OF THE CASE

This case questions the Michigan jurisdiction over the divorce and child custody proceedings between an Active Duty officer in the United States Army and his wife. The Plaintiff-wife filed a complaint for divorce in Macomb County Michigan when she and the couple's minor child were visiting her parents while the Defendant-husband was deployed for military duty. Upon his return, he counter-filed in the home state of Tennessee. The unique aspect of this case is that Michigan took subject matter and child custody

jurisdiction based on a definition of residency as her "intent to abide" in that state rather than on "actual physical presence" there. The husband argues that statutory law requires physical presence for at least 180 days prior to filing. Further, the Michigan Courts were satisfied that "intent" based on competing affidavits was sufficient to satisfy jurisdictional requirements. The husband argues that due process requires an evidentiary hearing with burden of proof on the Plaintiff-wife. The Defendant-father sought relief from Michigan's child custody determinations through the Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act while the Michigan Court opined that the presence of maternal relatives in Michigan constituted sufficient Significant Connection there. Since Michigan acted first in time, Tennessee, which initially took jurisdiction, elected to stay proceedings until Michigan relinquishes jurisdiction. The Defendant sought relief through the Soldiers and Sailors Civil Relief Act since his ability to litigate custody, visitation, and an equitable property settlement was prejudiced by his military duty-assignment that was 700 miles from the Michigan Court. The Supreme Court of Michigan heard oral arguments and noted that the Plaintiff-wife, as she moved from place to place with her husband, always considered herself a resident of Michigan—it saw no issue that required its review. The Petitioner seeks clarification of the law and denial of jurisdiction in Michigan.

REASONS FOR GRANTING THE PETITION

The Macomb County Circuit Court erred by taking subject matter jurisdiction in this divorce.

Divorce is purely statutory. The controlling statutory provisions are unassailable and could scarcely be written in a clearer fashion and the burden is on the Plaintiff to establish subject matter jurisdiction—jurisdiction cannot be conferred by waiver or consent, (*Smith v Smith*, 218 Mich. App. 727,

555 NW2d 2271 (1996) citing *Universal Am-Dan Ltd v. Attorney General,* 197 Mich App. 34, 494 NW2d 787 (1992)). The statutory residency and waiting period requirements of the Michigan Divorce Act admit of no other reading than that actual physical residence within the boundaries of the State of Michigan are mandatory. In *Stamadianos v. Stamadianos*, 425 Mich. 1 3845 NW2d 604 (1986), the Court **vacated** a judgment of divorce for lack of jurisdiction where admittedly neither party had physically lived in the **county** for the statutorily mandated ten days. The Court arrived at that conclusion by reviewing its long history of jurisprudence **requiring actual residence within the State for the statutorily mandated period of time.** If lifelong actual physical residents of Michigan as in *Stamadianos* cannot obtain a valid divorce because of the ten day county residency rule, than there is no way logical, legal, equitable, or any other way imaginable that the parties in this case can have their marriage dissolved by the Macomb Circuit Court either. (*Stamadianos, supra* and *Fowler v. Fowler,* 191 Mich. App. 318, 477 NW2d 112 (1991)).

By reference to all of the above emphasized language, the Legislature has mandated in the clearest terms imaginable not only that at least one party to a divorce must physically live within the physical boundaries of the State of Michigan for 180 days before filing suit, but also mandated that the plaintiff must physically live within the physical boundaries of the State of Michigan for 1 year before filing suit when the cause for divorce ether occurred or arose outside the physical borders of this State.

It is beyond even the most academic or esoteric debate that the Legislature intended anything other than that any person applying to a circuit court of this State for a divorce decree severing the bonds of matrimony MUST be a bona fide, actual, physical resident of the State of Michigan for a certain mandatory period of time. It is beyond any debate

imaginable that the plaintiff in this case did not meet the legislatively mandated jurisdictional requirements. There is no dispute on the operative facts between the parties.

There is no dispute between the parties in this divorce about where they cohabitated as husband and wife during the 180 days prior to the wife's filing for divorce in Macomb County Michigan. The couple does not dispute that they lived together with their minor child in their home at 46 Greenview, Nashville, Tennessee 37205, of which they were co-signatures on a mortgage contract. The wife admits that she moved all of her belongings to the residence, obtained a Tennessee driver's license, opened local bank accounts, and she was actively seeking employment in Nashville while the husband was stationed at Fort Campbell.

There is also no dispute that the Plaintiff-wife was living and working in Alexandria, Virginia when the couple met while he was living and going to medical school in Bethesda, Maryland. The couple agrees that, although the marriage ceremony occurred in Michigan, neither of them resided in Michigan during the 13 years after they were married. There is no dispute that the couple made trips back and forth to visit relatives in Michigan but this does not qualify to establish her residency in Michigan (*Bradfield v. Bradfield*, 154 Mich 115; 117 NW 588 (1908)) cited with approval in *Stamadianos, supra).*

Michigan's definition of "residence" is based entirely on Federal regulation (*Soto v. Director, Michigan Department of Social Services*, 73 Mich. App. 263, 251 NW2d 292, 297 (1977)). Residence in Michigan is defined as a place of abode accompanied with the intention to remain –the domicile and residence are synonymous terms in Michigan (*Hartzler v. Radeka*, 265 Mich 451, 251 NW 554 (1933) and *Reaume v. Silloway, Inc. v. Tetzloff*, 315 Mich. 95 23 NW2d 219 (1946)0). In divorce statue, the word "residence" means that place where one resides, an abode, dwelling or habi-

tation, especially a settled or permanent home or domicile and consists of the fact of abode and the intention of remaining in that abode (*Banfield v. Banfield*, 318 Mich 38, 27 NW2d 336, 338 (1947), citing *Wright v. Genessee Circuit Judge*, 117 Mich 244, 75 NW 465 (1898)). In Michigan, residence must be actual and not constructive—more than mere legal domicile is required (*Banfield, supra* at NW2d 336, 338). The last time the Michigan Supreme Court spoke directly on this issue was in *Coyouomjian v. Anspach*, 360 Mich 371 (1960), where the Court most clearly and simply confirmed its long standing precedent and jurisprudence, faithfully applying and following the Legislative mandates in this area, but carving out a very narrow exception for "involuntary absence" from the state. Otherwise, the Legislature has long seen fit to allow an absence from the state for 90 days or less without danger of losing Michigan residency.

Importantly, Federal law governs the state of residency for military members; a citizen of a state does not change his citizenship by military service unless he indicates intent to abandon the original domicile and adopt a new one *(Seegers v. Strzempek* 149 F. Supp. 35 (E.D. Mich. 1957)). For service members, the intent to change home of record must be written and processed through appropriate personnel services. This Federal law does not apply to dependents of members of the U.S. Armed Forces. The domicile of a married woman is that of her husband (*Seegers, supra)*—this rule arises out of the common-law rule related to the unity of the spouses. There is an exception to that rule where the unity is no longer a fact because of separate residence of the spouses under hostile circumstances showing evidentiary breach of that marital unity (*Seegers* at 149 F. Supp 35,36). If such a breach occurred in this case, it occurred on 16 May 1998, when the Plaintiff-wife moved from the Tennessee marital residence more than a month after the Complaint for Divorce and moved in temporarily with her mother in Macomb County Michigan.

Both the Circuit Court and the Michigan Court of Appeals erred in their opinion that residence is solely a matter of intent rather than a state of physical abode.

The only dispute in this case revolves around where the wife claims that she "intended" to reside during the period of time defined within statutory law as the requirement for determining jurisdiction. The Plaintiff-wife claims that her "intent" to reside in Michigan satisfies the jurisdictional conditions of MCL 552.9 that she resided in the State for 180 days and the County of Macomb for 10 days immediately preceding the filing of the Complaint. Even on the Complaint, however, as well as the Summons, the Verified Statement, and the Record of Divorce and Annulment, the Plaintiff-wife shows that her *residence* was, at the time of the filing, 46 Greenview, Nashville, Tennessee 37205, a fact that she dismisses as a temporary condition until she could enact a change of address. In fact, this Tennessee address had been her actual residence since July 1, 1997 until May 16, 1998[2], over a month **after the Complaint was filed,** when she left Tennessee to temporarily reside with her mother in East-pointe, Michigan.

Though intent is a key factor, other factors are to be considered in determining residency; they are presence, abode, property ownership, and other facts. (*Leader v Leader*, 73 Mich. App. 27[illegible] 251 NW2d 288 (1977). The

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[2] The Plaintiff-wife claims that she moved the child to Michigan in March 1998 but brought him back to Tennessee on 6 May 1998 only to try to work out an amicable solution to the divorce. She then unilaterally moved him again on 16 May 1998, never to return. The husband claims that the Michigan visit from March to 6 May was a mutually planned visit during his time of military deployment. There is, therefore, some dispute over the exact date of her move to Michigan but either way, the move is within a month of the filing of her Complaint for Divorce in Macomb County Michigan on 15 April 1998.

Plaintiff-wife cites *Leader, supra* to propose that the residence and domicile of the wife is not necessarily the same as those of the husband. The facts of *Leader*, however, are entirely different from those in this case. In *Leader*, the parties were residents of Michigan when they separated and filed a divorce action in Michigan. The husband obtained a job in Kentucky and, as an attempt to reconcile, the wife moved with him to Kentucky. The reconciliation failed, and after four months, the wife moved back to Michigan and proceeded with the divorce action. The husband challenged the jurisdiction claiming that the wife was not a resident of Michigan. The wife testified that she had no intention of establishing Kentucky as her residence unless the reconciliation was successful. The wife in *Leader* had an established abode in Michigan with intent to reside there barring a change in the marital relationship. The facts in the case at hand are instead analogous to those in the case of *Hoffman v. Hoffman* (155 Mich. 328; 118 NW 990 (1909)), which was cited and analyzed in *Leader, supra. Hoffman* stands for the proposition that the residence of the husband is the residence of the wife because the wife desires to make her home with the husband "indefinitely and permanently."

The Plaintiff-wife argues that she was a resident of Michigan when she married her husband and claims that she never intended to give up residency in the state where she was raised simply because of her husband's military employment—just as a service member maintains the home of record from which he/she entered military service even though the member is transferred from state to state or to other countries. He claims that she may have already given up residency in Michigan 3 years prior to their marriage by the fact that she was living and working in Alexandria, Virginia when they met.

Further, the splitting of physical abode and intention to abide should not be confused with the concept of "home of

record" which the military allows service members to maintain while simultaneously establishing residence within various legal jurisdictions over the course of a career. In this case, the husband's home of record for his military contract was Connecticut, where he was raised, but there is no dispute between the couple that neither of them ever resided in Connecticut—just as neither of them ever resided in Michigan during their marriage. It would be preposterous to contend that Connecticut should have subject matter jurisdiction in this case if the defendant was to proclaim his intent to move back to his hometown after completing military service, which is precisely the purpose of defining a "home of record" in the military contract—the military agrees to return service members back to a designated home of record. The same concept is not inherent within a marriage contract, even among military families, so it is equally preposterous to accept that Michigan should have subject matter jurisdiction in the divorce simply because the wife absconded with the minor child back to her parents home, claiming intent to live there after the fact.

Even if considering correctness of the legal interpretation, both courts erred in their application of due process by failing to place the burden of proving intent on the Plaintiff-wife; by quoting the wife's affidavit while overlooking the absence of substantial evidence required to address questions-of-fact raised by the husband's contradictory affidavit.

As proof of her intention to reside in Michigan, the Plaintiff-wife claims that she had a Michigan driver's license and Michigan voter registration while he points to the date on the Michigan driver's license showing that it was obtained after the filing. Further, he showed that she had a Tennessee driver's license at the time of her filing for divorce in Michigan and claims that she never voted in Michigan. She claims to have maintained membership in a Michigan health

club for 17 years while he claims that, while she may have joined the club in Michigan 17 years earlier, maintenance of membership to the national chain allowed her use of facilities in several of the states where they had resided over the years. Each argument raised in the Plaintiff wife's affidavit claiming intent to reside in Michigan is countered by a contradictory claim in an affidavit by the husband.

The fact that both members of the party lived, worked, paid taxes, and co-owned real property in various jurisdictions since 1984, over the course of the 13-year marriage, should be over-riding evidence of intention to reside together as man and wife. Almost a year prior to her filing in Michigan, the plaintiff agrees that she signed a mortgage contract and moved into a house in Nashville, Tennessee with her husband and minor child. There is strong evidence to support at least equal intent to reside at her "abode" in Tennessee for nearly a year prior to the filing for divorce in Michigan. On the other hand, there was no domicile in the State of Michigan prior to the Divorce Complaint. Moving in with her mother in Eastpointe, Michigan on May 16, 1998, a month after she filed her Complaint for Divorce does not satisfy the residency requirement of Michigan law. It is incongruent to believe that a wife can reside in the same house with her husband and minor child while simultaneously intending to reside in another state or, more precisely, that the law would support such a schizophrenic understanding of residency.

True, the Respondent may claim that she has the intention to remain in Michigan after the divorce is concluded. However, that intent to remain in the future is not dispositive; she is required to have established residency—a settled permanent home with the intention of remaining in that abode (*Banfield, supra)* at least 180 days prior to April 15, 1998, the date of the filing of the Complaint for Divorce. The Plaintiff-wife never had a permanent home in Michigan—constructive residence through living temporarily with her mother is not

enough—her permanent home was, up until at least May 16, 1998, in Nashville, Tennessee.

All the Circuit Court says about intent is that "the defendant herein has not offered documentary evidence to raise a question of fact regarding plaintiff's residency". But, the competing affidavits clearly do "raise a question of fact" concerning intent. Before asserting that it was "satisfied that the jurisdictional requirements of MCL 552.9 have been met," the Circuit Court should have held an evidentiary hearing. Instead, a specific request by the Defendant for an evidentiary hearing was denied.

In failing to find issues in need of review, the Michigan Supreme Court erred by failing to recognize dangerous precedence inherent in allowing statutory law regarding the definition of residency to be overridden by a concept as abstract and dubious as unproven intent.

As the Supreme Court recognized in *Stamadianos,* citing *Sona v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L. Ed. 2d 532 (1975), the Michigan residency requirement is intended to be jurisdictional so as to prevent "forum shopping" by complainants who may live in states where divorces are more difficult to obtain than they are under the Michigan no-fault divorce law. Tennessee is one of those states in which a divorce is more difficult to obtain because fault must be proven in that State.

The increasingly aberrant decisions of the Michigan Court of Appeals since 1960 have now gone so far afield of the State's Supreme Court's precedent and the clear Legislative mandates of our statutes that "residency" for purposes of obtaining a divorce decree has been reduced to a mere state of mind rather than the mandated state of being. Michigan should have no interest in being a "haven state" for disgruntled, run away spouses. It's sister states are fully capable

of adjudicating domestic disputes and according valid relief to the warring spouses. Yet under the Court of Appeals cases, that is exactly what Michigan has become—the place to go if you have ever lived there at all or had a notion to do so, without any regard for the time-honored definition of residence as "a place of abode coupled with an intention to remain."

The Michigan Courts have gone too far to separate physical abode and intention to abide. All that is needed now is a purported intent --an abode is entirely irrelevant. This is inconsistent with the law. It is inconsistent with the concept of family integrity and especially inconsistent for the well-being of military families who typically live in multiple jurisdictions over the course of a career. In our highly mobile society, almost no family under these rules would be safe from unilateral removal of minor children and marital property across jurisdictional boundaries.

The Macomb County Circuit Court erred in taking jurisdiction of child custody determination. The Michigan Court of Appeals and the Michigan Supreme Court then erred by overlooking proper procedure under the Uniform Child Custody Jurisdiction Act with regard to Tennessee jurisdiction.

There is no dispute between the parties in the operative facts of this case that the minor child, Alexander Knuth, date of birth November 3, 1995, was born in Augusta, Georgia and lived continuously in Georgia and then in Nashville, Tennessee until the mother unilaterally moved him to the grandmother's home in Michigan on 16 May 1998. He never resided in Michigan. He had neither been abandoned nor was there any emergency that required a Michigan court to protect the child against mistreatment or abuse. There is no dispute between the parties that the minor child was removed from the marital home in Nashville, Tennessee by the Respondent,

without the husband's knowledge or consent, and moved to the State of Michigan where she filed a divorce action in Macomb County Michigan within a month of moving there and obtained Ex Parte Orders of Support and Custody.

The Michigan Court took such action with full knowledge that the wife and minor child resided in Tennessee as they listed such address on the Complaint. Tennessee, not Michigan, is the "home state" of the minor child.

The Plaintiff-wife argued that the Macomb County Circuit Court should exercise jurisdiction to make child custody determination pursuant to MCL 600.653(1)(b) by claiming that the presence of the grandmother, aunts, uncles, and cousins in Michigan constituted significant connection to the state. She argued, that although the 2 ½ year-old himself had never lived in Michigan, he never established a scholastic record in the State of Tennessee. At the same time, the Defendant-father argued that he had not yet established any significant relationship with maternal relatives either. The Defendant-father has no connection to Michigan. The child had a future in Tennessee; the ties between Tennessee and Michigan were not by any measure equal.

Next, the Plaintiff-mother argued, and the Circuit Court agreed, that the presence of maternal relatives in Michigan constituted substantial evidence concerning the child's present or future care, protection, training, and personal relationships. The Circuit Court refused to recognize that the Plaintiff-mother had moved in with her parents, a temporary abode, but had no permanent residence of her own for herself and the minor child. The plaintiff had no employment in Michigan or visible means of supporting the couple's minor child. On the other hand, the Tennessee home was available and the Defendant-father was employed as a physician in the Army, at Fort Campbell, near the minor child's home. Evidence as to the fitness of the parents as well as to their financial circumstances was available in Tennessee, not

Michigan. Michigan is arguably an inappropriate forum pursuant to MCL 600.657.

Tennessee is the "home state" by statutory definition within the Uniform Child Custody Jurisdiction Act as enacted by the State of Tennessee as Code Sections 36-6-201 to 36-6-225. In a Motion for Dismissal by Summary Disposition pursuant to MCR 2.116 (C)(4), dated July 7, 1998, the Michigan Court was made aware that the Chancery Court of Montgomery County Tennessee had assumed jurisdiction in Case No. 98-05-0154 on May 28, 1998. Despite this, the Opinion and Order of the Macomb County Circuit, dated 24 September 1998 states,

> "Defendant next contends the Court should decline to exercise its jurisdiction under the Uniform Child Custody and Jurisdiction Act, MCL 600.651 et seq; MSA 27A.651 et seq (UCCJA") as Tennessee is the home state of Alexander and it has already taken jurisdiction of the matter. Again, the plaintiff disagrees. **She contends this Court should exercise jurisdiction over Alexander as the Tennessee courts have not exercised jurisdiction over him." (App. E, p. 11a)**

In fact, the Fourth Circuit Court for Davidson County, Tennessee had already rendered its order claiming jurisdiction of this matter on 7 August 1998 even though the order was not officially "entered" until 27 October 1998. (App F, p. 13a).

Nonetheless, Macomb County Circuit court was satisfied that it had jurisdiction under the UCCJA, specifically MCL 600.653(1)(b); MSA 27A.653 because, "further, as plaintiff's complaint for divorce was filed prior to the defendant's complaint, the Court is satisfied Michigan has priority over custody matters. See MCL 600.656(1) MSA 27A.656." (App E, p12a). The Michigan Court alleged that it was the Tennessee Court's duty to contact it and no such contact had been made. The Tennessee Court, on the other hand, alleged that it had contacted the Michigan Court several times before

the September 14th order without response, and when contact was finally made, the Michigan Court was adamant about retaining jurisdiction over the custody matters.

In any event, it is not enough that the wife filed first in time in Michigan. Pursuant to MCL 600.656(3) the Michigan Circuit Court should have stayed proceedings and communicated with the Tennessee court to determine which is the appropriate forum to make a custody determination (*Braden v. Braden*, 217 Mich App 331; 551 NW2d 467 (1996)) under the Uniform Child Custody Jurisdiction Act. In fact, this communication did not take place until some time after Macomb County Circuit Court had already rendered its Order and Opinion. When the Macomb County Circuit Court would not relinquish jurisdiction, the Tennessee Court stayed proceedings. Thus, a jurisdictional stand-off was set: the Tennessee Court refused to act until the Michigan Court backed down and Michigan would not relinquish jurisdiction until Tennessee acted.[3] The actions of the Michigan Court in this regard are not substantial compliance with the UCCJA as codified in Tennessee or Michigan. The determination takes on added significance if the plaintiff has not satisfied the residency and waiting-period requirements of MCL 552.9, meaning that the Macomb County Circuit Court had no jurisdiction to adjudicate the divorce action.

The Tennessee Court remains reluctant to enter into a confrontational relationship with a sister state and elects to stay proceedings pending final disposition of all appeals in Michigan. The child custody jurisdiction acts are intended to

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[3] The jurisdiction quagmire was exacerbated by the fact that two counties in Tennessee were inadvertently involved by the attorneys—Davidson County where the martial home was and where the wife hired legal counsel and Montgomery County where the husband worked and sought legal counsel. An attempt to consolidate the cases in one county resulted in the Davidson court relinquishing jurisdiction to the Montgomery court but never to the Michigan court.

deter abductions and other unilateral removals of children undertaken to obtain custody awards. They are also intended to prevent intrastate confrontation as occurred here when the rules were not adhered to. The case remains open to this day in Montgomery County Tennessee Circuit Court.

Next the Michigan Circuit court opines that Michigan is not an inconvenient forum for the Defendant-father. The decisions of the Michigan Courts are simply wrong. The father had no connection to Michigan and the 700 miles between the home state and Michigan, the mother's preference for residence, severely limited paternal access to the minor child and vice versa. The Circuit Court decision clearly prioritizes the best interests of the mother over the best interests of the minor child who deserves equal access to both a mother and a father more so than equal access to a mother and maternal relatives.

> **No litigant can be forced to endure the orders and control of a court that has no power or control over him in the first place.**

The law is the law. Jurisdiction either exists or it does not. The passage of time does not negate the egregious wrong or make it less capable of redress. The agonizing situation that occurred in this case is clearly capable of being repeated again and again and again.

During oral argument in front of the Michigan Supreme Court, one of the justices queried whether this appeal was not somewhat of "a fool's errand", presumably because the Court is of the opinion that vacating this obviously void judgment would not afford Appellant any "real" relief. The "parade of horribles" from enforcing the statute at this late date would presumably include disturbing the child, disturbing the mother, a nightmare in trying to recover and redistribute property, possibly a re-filing of the suit in Macomb County

anyway, and basically the same resulting judgment possibly being issued.

With all due respect to this Honorable Court, none of these supposed or imagined or speculative consequences of enforcing the statutory law in this case and vacating this invalid, void judgment are in any way relevant. The consequences of undoing the grievous wrong that has been done here to Appellant are matters to be dealt with by these litigants, and should not be of any dispositive concern to this Court whatsoever.

If any Court believes that it is somehow "too late" to provide any "real relief" for this particular litigant, this issue must still be addressed under so-called "mootness" jurisprudence.

Even if the Michigan Supreme Court views the case as "moot", the issue of jurisdiction is absolutely capable of recurring but evading appellate review and should be addressed. Disposition based on "mootness" is not required when the underlying conduct is capable of repetition, yet evades review. *Mead v. Batchelor*, 435 Mich 480 (1990). Further, where a court's adverse judgment may have collateral legal consequences for a defendant, the issue is not necessarily moot. *Id.* at 487, (citation omitted).

The Petitioner respectfully urges this Honorable Court to consider "mootness" jurisprudence as it applies to this critical jurisdiction issue. See, e.g., *Detroit Firefighters Association v. City of Detroit*, 449 Mich 629 (1995) and numerous cases cited therein, including *Socialist Workers Party v. Secretary of State*, 412 Mich 571, 582 (1982).

Soldiers need to be secure in belief that their families, homes, and property remain free from destructive legal proceedings while they are deployed.

The Macomb County Circuit Court of Michigan erred by nullifying the Soldiers and Sailors Civil Relief Act (SSCRA).

The wife argued that the SSCRA was enacted to safeguard the rights of service persons in times of war and national crisis. The Michigan Supreme Court holds otherwise (*Haller v. Walczak*, 347 Mich 292; 79 NW2d 622 (1956)).

The SSCRA was enacted to protect the civil rights of persons in military service remote from the site of litigation, precisely as it should have in this case. As a commissioned officer in the United States Army, the defendant husband was not free to travel outside a limited radius of his duty station without specific permission from superior officers. His ability to meet with counsel, attend hearings, or participate in the defense of the divorce action or adequately contest a child custody determination while stationed 700 miles away was indeed materially prejudiced. The Macomb County Circuit Court was simply wrong in its opinion that Michigan was not an inconvenient forum for the husband. The court did not foster a level playing field as the wife, on the other hand, would not have encountered similar restrictions or regulations on her comings and goings in either jurisdiction.

Soldiers need to be secure in belief that their families, homes, and property remain free from legal proceedings that are designed to destroy or dissolve them while they are deployed, whether for a training assignment or for actual combat, or they are otherwise handicapped from full or equitable engagement in litigation because of military service.

In this case, the wife litigated restraining and custody orders while the husband was deployed. Since there was no urgency, the Macomb County Circuit Court should have

stayed proceedings under the SSCRA, especially when it learned that the Defendant-soldier sought to exercise rights in another jurisdiction.

CONCLUSION

Under the Michigan Court of Appeals published cases, residency is now only in the mind, not grounded in anything physical. The agonizing situation that occurred in this case is clearly capable of being repeated again and again and again.

This situation cannot be allowed to stand. Not only is the Petitioner, who comes before this Court imploring that justice finally be rendered, but the People of the State of Michigan, soldiers from any state throughout these United States, and indeed all parents in our highly mobile society who move from place to place during a marriage, need for this land's Highest Court to issue a definitive, bright line rule that leaves no doubt whatsoever that statutes enacted by our Legislature mean exactly what they say: only bona fide, actual Michigan residents who physically reside within its borders may apply to its circuit courts to dissolve troubled marriages, make critical decisions on the custodial best interest of involved children, and distribute property.

Practical considerations are not the issue. The most basic of our civil liberties is: whether a citizen may be compelled to submit to the power and authority of a court with no duly authorized power or authority over him in the first place.

Basic due process demands proper adjudication and plenary consideration by this Honorable Court.

Soldiers need assurance that spouses cannot unilaterally run off to foreign jurisdictions with their minor children and marital property while they are deployed in the service of their country.

Wherefore, Petitioner THOMAS E. KNUTH, moves this Honorable Court to consider the questions presented, and

upon such consideration, deny Michigan jurisdiction in this case, clarify jurisdictional law that will serve the best interests of minor children of military families by giving equitable rights to parents who are also soldiers.

Respectfully Submitted,

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